

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

<b>In re: BRIDGESTONE/FIRESTONE, INC.,</b>	) <b>Master File No. IP 00-9373-C-B/S</b>
<b>TIRES PRODUCTS LIABILITY LITIGATION</b>	) <b>MDL NO. 1373</b>
_____	)
<b>THIS DOCUMENT RELATES TO</b>	)
	)
<b>GINA SANTANGELO, et al.,</b>	)
	)
<b>Plaintiffs,</b>	) <b>Case No. IP 01-5369-C-B/S</b>
	)
<b>vs.</b>	)
	)
<b>BRIDGESTONE/FIRESTONE, INC., et al.,</b>	)
	)
<b>Defendants.</b>	)

**ENTRY ON FIRESTONE’S MOTION TO COMPEL**

This cause is before the magistrate judge on the motion of defendant Bridgestone/Firestone North American Tire, LLC (“Firestone”) entitled Motion to Compel Responses to Subpoenas for Production of Documents and for Deposition Testimony Regarding the Subject Tires Served on Plaintiffs’ Designated Tire Expert and Prior Counsel. The motion is fully briefed, and the magistrate judge, being duly advised, **GRANTS IN PART AND DENIES IN PART** Firestone’s motion for the reasons set forth below.

This case arises out of an automobile accident that occurred in California in May 1998. In the months following the accident, the plaintiffs hired an attorney, John Crookham, who hired H.R. Baumgardner and his company, Tire Consultants, Inc., to examine the Firestone tires that were involved in the accident. Baumgardner examined the tires at that time and prepared a report. Mr. Crookham, on behalf of the plaintiffs, apparently negotiated a settlement against the applicable automobile insurance carrier and, for reasons that are not on the record, did not pursue a product liability action against Firestone. Plaintiffs, who are now represented by different counsel, are pursuing their claims against Firestone in this action. Plaintiffs have named Mr. Baumgardner as one

of their expert witnesses in this case, and he has submitted his expert report setting forth his opinions regarding the subject tires<sup>1</sup> and the data on which he bases those opinions.

The instant motion arises out of the fact that the subject tires no longer exist, having been disposed of by Tire Consultants, Inc., apparently at the direction of Mr. Crookham after the settlement was reached with the insurance company. Firestone served subpoenae on Mr. Baumgardner, Tire Consultants, Inc., and Mr. Crookham seeking all documents in their possession, custody or control that relate to the subject tires. The plaintiffs responded to the subpoenae<sup>2</sup> issued to Mr. Baumgardner and his company by producing certain documents and providing a privilege log listing approximately eight documents that they withheld from production on the grounds that they constituted attorney work product.<sup>3</sup> However, the work product privilege was not the plaintiffs' to assert; rather, "[t]he attorney is the exclusive holder of the privilege." State Comp. Ins. Fund v. Superior Court, 91 Cal.App.4th 1080, 1091 (Cal. App. 2001). Mr. Crookham has not asserted the privilege himself, and, in fact, Firestone's counsel avers that Mr. Crookham's counsel informed him that Mr. Crookham does not intend to assert the work product privilege regarding any documents related to the Santangelo tires.

In addition, even if the work product privilege were properly asserted as to the documents in Mr. Baumgardner's files, the magistrate judge determines that all documents in Mr. Baumgardner's

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<sup>1</sup>Mr. Baumgardner opines that the left rear tire of the vehicle involved in the accident was defective.

<sup>2</sup>In response to the instant motion, the plaintiffs argue that the motion should have been filed in the courts which issued the subpoenae at issue—the Northern District of Georgia and the District of Arizona. While this would certainly have been the case had the subpoenaed parties themselves objected to the subpoenae, see Federal Rule of Civil Procedure 37(a)(1), Firestone's motion, while technically seeking an order directed to the subpoenaed parties, is in reality directed to the objections of the plaintiffs, and therefore is properly heard by this court.

<sup>3</sup>It is not entirely clear from the parties' briefs whether the plaintiffs have continued to withhold all or only a portion of these documents.

files that relate to the subject tires nonetheless would be discoverable. First, any data regarding or analysis of the tires themselves would be discoverable pursuant to Federal Rule of Civil Procedure 26(a)(2)(B) as “information considered by the witness in forming the opinions.” This is especially true in this case, in which Mr. Baumgardner prepared his expert report after the tires were destroyed, and therefore would necessarily have had to consider all of the information in his files, including information received from Mr. Crookham as well as his own earlier inspection and consultative reports, to arrive at an informed opinion regarding the tires. In light of the fact that the tires have been destroyed, this information also is discoverable pursuant to Federal Rule of Civil Procedure 26(b)(3), inasmuch as Firestone has substantial need of all documentation regarding the condition of the tires before they were destroyed, and it is unable to obtain that information elsewhere. Finally, any information in the file relating to the destruction of the tires also would be discoverable pursuant to Rule 26(b)(3). Firestone is entitled to discover both when and why the tires were destroyed, inasmuch as this information is relevant to its spoliation of evidence defense. It has no other means of verifying that the explanation offered by plaintiffs is accurate other than examining the contents in Mr. Baumgardner’s (and/or Mr. Crookham’s) files relating to the issue. Accordingly, Firestone’s motion to compel is **GRANTED** as to the documents from the files of Mr. Baumgardner and/or Tire Consultants that have been withheld from production.<sup>4</sup>

The plaintiffs also objected to the subpoena issued to Mr. Crookham, and also objected to Mr. Crookham answering virtually any questions when Firestone attempted to depose him regarding the subject tires. Inasmuch as Mr. Crookham has not asserted the work product privilege, there is no basis for withholding any documents in Mr. Crookham’s files that relate to the subject tires, with the

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<sup>4</sup>By “files,” the magistrate judge is referring to all documents within the possession, custody, and control of the subpoenaed parties.

exception of any confidential communications with his clients, which are protected by the attorney client privilege that is held by the plaintiffs. Further, for the reasons set forth above, all documents not subject to the attorney-client privilege would be discoverable pursuant to Rule 26(b)(3). Accordingly, Firestone's motion is **GRANTED** as to all documents in Mr. Crookham's files relating to the subject tires that are not subject to the attorney client privilege. Further, Mr. Crookham's deposition may be reopened, and Firestone may question him regarding the subject tires, subject only to objections on the grounds of attorney client privilege.

In light of the fact that Mr. Baumgardner is scheduled to be deposed in this action on June 7, 2002, the plaintiffs shall provide Firestone with fax copies of the withheld documents from his files **by the end of business today**, and shall provide non-fax copies at the start of the deposition. If the plaintiffs are in possession of Mr. Crookham's files,<sup>5</sup> they shall provide Firestone with copies of all documents from those files relating to the subject tires **within 5 business days of the date of this Entry**, along with a privilege log listing any documents withheld as covered by the attorney-client privilege. If the plaintiffs are not in possession of Mr. Crookham's files, they shall so notify Firestone immediately, so that Firestone may make arrangements with Mr. Crookham to obtain the relevant documents.

ENTERED this \_\_\_\_\_ day of June 2002.

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V. Sue Shields  
United States Magistrate Judge  
Southern District of Indiana

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<sup>5</sup>The plaintiffs subpoenaed the files from Mr. Crookham last month.

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